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October 20, 1997

William Caton  
Office of the Secretary  
Federal Communications Commission  
1919 M Street, N.W. Room 222  
Washington, DC 20554

**RECEIVED**

**OCT 20 1997**

**FCC MAIL ROOM**

Re: Application by BellSouth for In-Region InterLATA Authority in South Carolina  
CC Docket No. 97-208

Dear Mr. Caton:

Enclosed for filing please find the original and nine (9) copies of the **Comments of Philip S. Porter-Consumer Advocate for the State of South Carolina** in the above referenced proceeding. Also enclosed is a copy of the Comments on diskette in WordPerfect 6.0 format. Please indicate your receipt of this filing on the additional copy provided and return it to me in the envelope provided. Thank you for your assistance.

Sincerely,

*Elliott F. Elam, Jr.*

Elliott F. Elam, Jr.  
Staff Attorney

Enclosure(s)  
cc: service list

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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OCT 20 1997

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In the Matter of )  
 )  
Application by BellSouth Corporation, )  
BellSouth Telecommunications, Inc., and )  
BellSouth Long Distance, Inc. for )  
Provision of In-Region, InterLATA )  
Services in South Carolina )  
\_\_\_\_\_ )

CC Docket No. 97-208

**COMMENTS OF PHILIP S. PORTER  
CONSUMER ADVOCATE FOR THE STATE OF SOUTH CAROLINA**

Philip S. Porter, Consumer Advocate  
Nancy Vaughn Coombs, Deputy Consumer Advocate  
Elliott F. Elam, Jr., Staff Attorney

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October 20, 1997

## INTRODUCTION

Philip S. Porter-Consumer Advocate for the State of South Carolina (Consumer Advocate), respectfully submits these initial comments on the Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. (BellSouth) to provide in-region, interLATA services in South Carolina.

Philip S. Porter is the duly appointed and qualified Consumer Advocate for the State of South Carolina. Pursuant to S.C. Code Ann. § 37-6-604 (Supp. 1996), and 26 S.C. Code Ann. Regs. 103-830 et seq., (1976 and Supp. 1996), the Consumer Advocate is the state official who has the discretionary duty to provide legal representation of the consumer interest before state and federal regulatory agencies when such agencies undertake to fix rates or prices for consumer products or services or to enact regulations or establish policies related thereto, and in that capacity the Consumer Advocate files these comments.

Based on his review of the testimony and exhibits presented in the hearing before the South Carolina Public Service Commission (SCPSC), as well as BellSouth's Application in the instant proceeding, the Consumer Advocate recommends that the Commission:

- (1) find that BellSouth is not, at this time, entitled to in-region interLATA relief in South Carolina based on Section 271(c)(1)(B), commonly referred to as "Track B";
- (2) find that BellSouth's Statement of Generally Available Terms and Conditions (SGAT) does not meet the requirements of Section 271(c)(2)(B)(ii) and Section 271(d)(3)(A)(ii), because BellSouth has not fully implemented cost based rates for interconnection and unbundled network elements (UNEs) in accordance with the requirements of Sections 251(c)(3) and 252(d)(1); and,

- (3) find that granting BellSouth in-region interLATA authority in South Carolina is not, at this time, in the public interest.

**I. BELLSOUTH DOES NOT QUALIFY FOR IN-REGION INTERLATA RELIEF IN SOUTH CAROLINA UNDER TRACK B**

In its Brief in support of its Application, BellSouth asserts that it is entitled to in-region interLATA relief based on Track B. In order to apply for authority under Track B, BellSouth would have to show that no competing provider capable of providing local exchange service to both residential and business customers over its own facilities has requested access and interconnection from the company. Once such a qualifying request has been made, as it has in South Carolina by AT&T and others, Track B is unavailable to BellSouth.<sup>1</sup>

Once a qualifying request for interconnection has been made, the only way an RBOC may proceed under Track B is if the state commission certifies that the only provider or providers making the requests for interconnection have failed to negotiate in good faith, or that they have failed to comply with the implementation schedule contained in an interconnection agreement. In its Brief, BellSouth asserts the SCPSC's finding that "none of [BellSouth's] potential competitors are taking any reasonable steps towards implementing any business plan for facilities-based local competition for business and residential customers in

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<sup>1</sup>This interpretation of Track B was set forth in this Commission's Order in In the Matter of Application by SBC Communications, Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region InterLATA Services in Oklahoma, Memorandum Opinion and Order, FCC 97-228, CC Docket No. 97-121, June 25, 1997 ("SBC Oklahoma Order").

South Carolina" provides the basis for this Commission to find that Track B is not foreclosed to BellSouth in South Carolina. While the Consumer Advocate agrees that local competition is not progressing as fast as it should, this is not a reasonable or permissible basis for the Commission to grant BellSouth's request in this case.

Initially, there has been no allegation by BellSouth, or a finding by the SCPSC, that BellSouth is entitled to Track B relief for the specific reasons set forth in Track B. There was, and is, no specific allegation that a potential competitor has failed to negotiate in good faith or violated the terms of an agreement by the competitor's failure to comply, within a reasonable time, with the implementation schedule contained in such an agreement. In fact, a review of BellSouth's interconnection agreements in South Carolina<sup>2</sup> will reveal few, if any, implementation schedules. For the only interconnection agreement which required arbitration by the SCPSC, namely the AT&T agreement<sup>3</sup>, there is no implementation agreement which sets forth a timetable for AT&T to do anything. The SCPSC's arbitration order<sup>4</sup> likewise fails to set forth an implementation schedule, despite the requirement in Section 252(c)(3) which requires a state commission to provide a schedule for the implementation of the terms and conditions by the parties to the arbitrated agreement. BellSouth and the SCPSC are in no position to assert failure to act on the part of the company's competitors when neither utilized these provisions.

Beyond this, even if BellSouth was somehow blameless for the current void of local

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<sup>2</sup>BellSouth Application at Appendix B.

<sup>3</sup>BellSouth Application at Appendix B, Volume 8, Tab 69

<sup>4</sup>BellSouth Application at Appendix B, Volume 8, Tab 69 "Order on Arbitration".

competition in South Carolina, the claim that competitors aren't taking any reasonable steps towards implementing facilities-based local competition for business and residential customers is not supported by the record in this case. The AT&T arbitration noted above is an example of a competitor taking steps to provide facilities-based local competition. When the SCPSC issued its arbitration order on March 11, 1997, it gave BellSouth 90 days to file verifiable cost studies to support the prices for its UNEs.<sup>5</sup> As of the hearing on BellSouth's SGAT-Section 271 request in July, those studies, while "available" to the SCPSC, were not filed there due to BellSouth's insistence on execution of a lengthy confidentiality agreement.<sup>6</sup> The SCPSC's consideration of BellSouth's SGAT and Section 271 filing only served to further delay consideration of BellSouth's cost studies for interconnection and UNEs. As noted in BellSouth's Application, the SCPSC has established its Docket No. 97-374-C, at AT&T's request, to examine BellSouth's cost studies. The request was similar to one the Consumer Advocate made during AT&T's arbitration hearing as long ago as February of this year. A notice was issued in September, a hearing is set for December 1997, and a decision will be issued in early 1998.<sup>7</sup>

Once more permanent rates are in place for UNEs and interconnection, AT&T and the other companies who have received certification to provide local service in South Carolina will be able to begin to implement facilities based competition, with more secure knowledge

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<sup>5</sup>BellSouth Application at Appendix B, Volume 8, Tab 69 "Order on Arbitration".

<sup>6</sup>BellSouth Application at Appendix C Volume 5a Tab 61 - SCPSC Transcript of Hearing Volume 4 at 71-72.

<sup>7</sup>BellSouth Application at Appendix A Volume 5 Tab 14, Varner Affidavit at ¶¶ 27-28.

of what their costs of doing business will be. There is nothing unusual about other companies waiting for AT&T to resolve large and complex issues such as these, and to benefit from its negotiation and/or litigation of the issues. Once that logjam is broken, competition will be closer to reality.

Therefore, the current lack of local competition is not, in itself, evidence that BellSouth's competitors are not taking steps to implement facilities based local competition. To the contrary, it is evidence that the progression of the process in South Carolina has gotten out of order, and needs to be put back on a more logical track, one which is also consistent with the process set forth in the Telecommunications Act. Only after this process has been completed would it be appropriate for this Commission to take the steps referred to in its SBC Oklahoma Order and examine the issue of whether competitors are attempting to keep BellSouth out of the in-region interLATA market through their own inaction.<sup>8</sup>

## **II. BELLSOUTH'S SGAT DOES NOT COMPLY WITH THE COMPETITIVE CHECKLIST BECAUSE THE COMPANY HAS NOT FULLY IMPLEMENTED COST BASED RATES FOR INTERCONNECTION AND UNBUNDLED NETWORK ELEMENTS**

In its Order endorsing BellSouth's SGAT, the SCPSC found that the rates in the statement for interconnection and UNEs "are cost-based within the requirements of the 1996 Act." Order at 55. However, it is clear from the record of the case before the SCPSC that these rates are not cost-based, as required by Section 252(d) of the Act. Therefore, BellSouth has not complied with the requirements of the competitive checklist in Section

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<sup>8</sup>SBC Oklahoma Order at ¶58.

271(c).

According to BellSouth's responses to discovery in the SCPSC proceeding, the rates in its SGAT for interconnection and UNEs were derived from several sources.<sup>9</sup> In its response to Consumer Advocate Interrogatory No. 1-1, the company stated that its prices were based on such things as FCC proxies, prices from its agreement with ACSI (which were not supported by any cost studies and are subject to true up), federal and state tariff prices (which may or may not have any cost basis), prices from other states (which are subject to true up), and its own unaudited cost estimates. None of these rates were evaluated by the SCPSC pursuant to the costing standards set forth in the Act. Indeed, as discussed above, the SCPSC will not even begin to review BellSouth's cost studies until its proceeding scheduled for later this year.

In this Commission's order addressing the request of Ameritech for in-region interLATA relief in Michigan<sup>10</sup>, it found that a BOC's promises of future performance to address particular concerns raised by commenters have no probative value in demonstrating its present compliance with the requirements of Section 271. The Commission found that evidence demonstrating that a BOC intends to come into compliance with the requirements of Section 271 by day 90 is insufficient.<sup>11</sup> In this case, BellSouth and the SCPSC are asking

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<sup>9</sup>BellSouth Application at Appendix C Volume 1 Tab 18.

<sup>10</sup> In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region InterLATA Services in Michigan, Memorandum Opinion and Order, FCC 97-298, CC Docket No. 97-137, August 19, 1997. ("Ameritech Michigan Order").

<sup>11</sup>Id. at ¶55.



this Commission to accept that the SCPSC will set cost based rates for interconnection and UNEs after the 90 day period of the consideration of this application, in its proceeding scheduled for later this year. While BellSouth and the SCPSC may assert that the rates in the SGAT are based on cost, they are clearly not. For this reason, BellSouth's application is premature.

It is the Consumer Advocate's opinion that this lack of definitive cost based rates is one of the reasons facilities based competition has been slow to develop in South Carolina. Not surprisingly, companies want to know what their primary costs will be before they decide to invest in a certain market. The Telecommunications Act recognizes this through the provisions of Section 271 requiring cost based rates to be implemented prior to permitting BOC entry into in-region interLATA services. Given the SCPSC's decision to set the resale discount for BellSouth's services at a comparatively scant 14.8%<sup>12</sup>, it is also not surprising that BellSouth's potential competitors find little comfort in a promise to set cost based rates in the future. Therefore, this Commission should find that BellSouth's application does not show that the requirements of the competitive checklist have been met.

### **III. BELLSOUTH'S ENTRY INTO THE IN-REGION INTERLATA MARKET IS NOT IN THE PUBLIC INTEREST AT THIS TIME**

Pursuant to Section 271(d)(3)(C) of the Act, the Commission will be required to determine if BellSouth's entry into the in-region InterLATA market in South Carolina is consistent with the public interest, convenience and necessity. The purpose of the public

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<sup>12</sup>BellSouth Application at Appendix B, Volume 8, Tab 69 "Order on Arbitration".

interest test in the Act is to ensure that applications to enter the in-region interLATA market satisfy the spirit of the legislation as well as the technical details. The key question for this Commission is whether consumers in South Carolina will be better off if the application is approved or denied. In answering this question, the Commission must look at the overall purpose of the Act, which is opening all telecommunications markets to competition.

In its Application, BellSouth urges this Commission, as it did the SCPSC, to only look at the effect its entry will have on the interLATA market. The Consumer Advocate agrees with BellSouth that competition in the interLATA market is certainly less than perfect, and exhibits lockstep pricing behavior by the major carriers. He also agrees that it is important to increase competition in the interLATA market. However, while witnesses for BellSouth Long Distance testified before the SCPSC that its entry into the long distance market will result in lower prices for consumers in South Carolina, there is no guarantee that BellSouth will not become part of the lockstep pricing problem which the company criticizes. There is also no guarantee that BellSouth will have to cut long distance prices in order to obtain market share. In fact, BellSouth has every incentive to keep toll competitors out of its area, so that it will be the only carrier with one stop shopping. Therefore, while there may be some short term benefit to BellSouth's entry, that benefit is speculative, at best, given the current state of competition in that market.

Since there already is some competition in the long distance market, the primary focus for this Commission in evaluating the public interest should be whether consumers in South Carolina have a realistic choice for local telephone service. If consumers have a realistic choice, many of the other potential problems with BellSouth's entry into the long distance

market will be lessened. If consumers have a realistic choice, that will indicate that BellSouth is not discriminating against its competitors for access and interconnection to its network. If consumers have a realistic choice long term competition in all telecommunications markets will be able to develop freely. And if consumers have a realistic choice for local service, the rates for those services are more likely to fall. That, above all else, was the promise of the changes brought about by the Telecommunications Act.

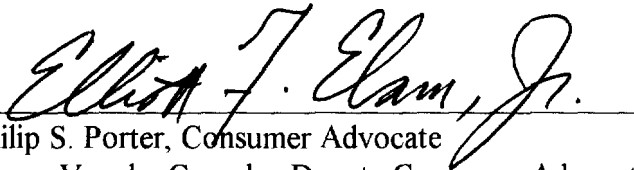
Another area of concern is the development of competition. South Carolina has many small and diverse communities, some that are geographically isolated. In conducting this analysis, the Commission should examine whether the market is open to competition throughout BellSouth's service territory. Competition should be available in both rural and urban areas, and in low income areas as well as high income areas. This does not require there to be a competitive alternative for every BellSouth customer. Instead, the Commission should require a showing of real and geographically widespread local competition before concluding that BellSouth's entry into the in-region interLATA market is in the public interest.

In examining the record in this case, it is clear that competition for local service in BellSouth's service territory is virtually non-existent, even on a resale basis. Consumers do not have a realistic choice of local service providers. Therefore, the Consumer Advocate urges the Commission to find that BellSouth's entry into the in-region interLATA market is not currently in the public interest.

## CONCLUSION

For the reasons set forth above, the Consumer Advocate urges the Commission to find that BellSouth does not qualify for in-region, interLATA relief in South Carolina at this time.

Respectfully submitted,

A handwritten signature in cursive script, reading "Elliott F. Elam, Jr.", is written over a horizontal line.

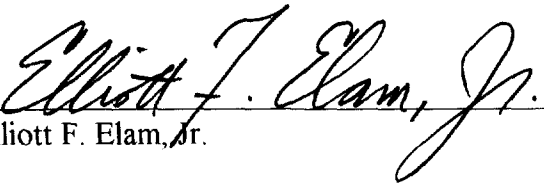
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October 20, 1997

## CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of October 1997, I caused copies of the **Comments of Philip S. Porter - Consumer Advocate for the State of South Carolina** to be served upon the parties on the attached listed by deposit in the United States Mail, postage prepaid.

  
Elliott F. Elam, Jr.

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